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SUBJECT: ARGENTINA: ANALYSIS OF TIP LAW

REF: A) BUENOS AIRES 465
B) BUENOS AIRES 438

¶1. (SBU) Summary. Local NGOs and the Argentine government's National Institute for Anti-Discrimination (INADI) and the National Ombudsman's Office have criticized the anti-TIP legislation passed on April 9. Their concern is that adult trafficking victims will have to prove that they did not consent to their exploitation. However, under a strict interpretation of the law, even adult victims who "consented" to exploitation would still be considered trafficking victims under the law if the state proves any of the means of trafficking (e.g., by fraud, intimidation, force, abuse of power or vulnerability, etc.).

¶2. (SBU) According to legal scholars, the GOA can ensure that judges, prosecutors, and law enforcement officials properly interpret and implement the law -- if there is sufficient political will to do so. The local representative of the International Organization for Migration (IOM) and other NGOs argue that Colombia's first anti-trafficking law had similar gaps which resulted in low prosecutions until amendments were adopted a few years later. Time will tell whether the Argentine law needs similar amendments. In the meantime, Post will continue to urge, monitor, and support vigorous implementation of the anti-TIP law. End summary.

Victim's Consent Explained

¶3. (U) On April 9, the Argentine Congress passed anti-TIP legislation despite concerted objections from some Members of Congress and some NGOs over whether an adult trafficking victim can consent to his or her own exploitation. The debate centers around article 3(b) of the Palermo Protocol which clarifies that once a prosecutor not only proves that a suspected trafficker recruited, transferred, transported, harbored, or received a victim for the purpose of exploitation, but also used one of the necessary "means" (i.e., force or other forms of coercion, abduction, fraud, deception, abuse of power, abuse of a position of vulnerability, or giving/receiving payments or benefits to achieve a persons' consent), a victim's consent is not possible, regardless of age, and therefore legally irrelevant.

¶4. (U) The law's definition of exploitation tracks with the Palermo Protocol. In the case of children, the law's article 3 excludes the "means" element, which also appears to be protocol-consistent. Article 3 defines trafficking in minors as:

"the recruitment, transportation and/or transfer - whether domestically or internationally - the harboring or receipt of persons younger than 18 years of age, for the purpose of exploitation.

Trafficking in minors exists even when no deception, fraud, violence, threat or any means of intimidation

or coercion, abuse of authority or a vulnerable situation, giving or receiving payments or benefits was used to obtain the consent of a person having control over the victim."

15. (U) Article 3 of Argentina's law also explicitly states that in the case of victims under the age of 18 "assent will not have any effect", i.e., irrelevant. The law, however, does not explicitly make "assent" irrelevant in the case of adult victims. As a result, IOM, various NGOs, and government agencies such as the National Institute of Anti-Discrimination and the National Ombudsman's Office have argued the law falls short of Argentina's Palermo Protocol obligations.

16. (SBU) Instead, article 2 of the law defines trafficking of adults aged 18 and over as:

"the recruitment, transportation and/or transfer - whether domestically or internationally- the harboring or receipt of persons older than 18 years of age, for the purpose of exploitation, by means of deception, fraud, violence, threat or any means of intimidation or coercion, abuse of authority or a vulnerable situation, or of the giving or receiving of payments or benefits to obtain the consent of a person having control over the victim, even if the victim assented."

One penal expert told us that a strict interpretation of this article would mean that even if an adult victim consented to his or her own exploitation, they would be considered trafficking victims under the law if the state proves any of the means of trafficking (e.g., by fraud, intimidation, force, abuse of power or vulnerability, etc.). A university law professor noted that the word "assent" in legal terminology means "passive consent", but many attorneys would most likely not make this distinction, and would use

it interchangeably with "consent". This expert believed that the law's intent is clear: adult trafficking victims should receive due protection under the law regardless of consent. Still, both experts acknowledge that strong political will from the GOA is required to ensure that judges, prosecutors and law enforcement officials properly interpret and implement the law.

17. (SBU) The local IOM office, some local NGOs, and some members of the Argentine Congress maintain, however, that the law is subject to misinterpretation precisely because the law does not explicitly state that "assent" is irrelevant in the case of adult victims. They point out that Colombia's first anti-trafficking law had similar gaps which resulted in low prosecutions until amendments were adopted a few years later. IOM Country Representative Eugenio Ambrossi explained that if law enforcement, prosecutors, or judicial officials do not wish to investigate a possible TIP crime, they may stop the line of questioning by establishing that a victim initially consented and hence, dismissing the case. Citing the level of corruption in Argentina, he speculated that most officials would stop at the first line of questioning.

Other Provisions

18. (U) Article 5 of Argentina's anti-TIP law establishes that "trafficking victims can not be punished for committing any crime that is the direct result of having been a trafficking victim." It also states that victims will not be subject to penalties arising from migration violations when the violations are a direct result of having been a trafficking victim. Article 6 outlines a victim's right to:

- Receiving information on their rights in a language they understand, and in a manner that is appropriate to their age and maturity;
- Receiving appropriate housing, maintenance, enough food and appropriate personal hygiene;
- Receiving free psychological, medical and juridical assistance;

- Testify under protection and care;
- Protection against any possible retaliation against the victim or the victim's family, participate in Argentina's national witness protection program;
- The adoption of necessary measures to guarantee their physical and psychological integrity;
- Be informed of the status and evolution of trial proceedings;
- Keep their identity protected
- Remain in-country, in conformity with existing legislation
- Have their return to their place of residence facilitated; and
- Voluntarily gain free access to assistance.

In the case of minors, Article 6 stipulates that in addition to the aforementioned rights, under no circumstance will they be compelled to face their captors. In addition, measures to protect minor victims can not be used to restrict their rights or guarantees, nor deprive them of their freedom. Finally, the law states that authorities will seek to reintegrate minor victims with their nuclear or extended family or community.

¶9. (U) Article 7 states that under no circumstance will prisons, jails, police stations or detention centers be used to house trafficking victims. Article 8 establishes that trafficking victims have the right to privacy, identity protection, and confidential trial proceedings. Article 9 directs Argentine diplomatic and consular representatives to provide assistance and facilitate the return of Argentine trafficking victims abroad, should they ask for such assistance.

COMMENT

¶10. (SBU) The local IOM representative, some Members of Argentina's Congress, and a number of interested NGOs have valid concerns that the law's omissions may result in a misapplication of the law. Only time will tell if the GOA and the judicial branch have the political will to make it work. In the meantime, Post will continue to urge, monitor, and support vigorous implementation of the anti-TIP law.

WAYNE